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No. 16-54

IN THE
Supreme Court of the United States

JUAN ESQUIVEL-QUINTANA,

Petitioner,

v.

LORETTA E. LYNCH,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775 (1997) 13

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization in the United States representing attorneys practicing in the field of criminal defense—including private criminal-defense lawyers, public defenders, active U.S. military defense counsel, law professors, and judges committed to preserving fairness within America's criminal justice system. NACDL files numerous amicus curiae briefs each year in this Court and other courts. This Court has often cited NACDL amicus curiae briefs that address the everyday workings of the criminal-justice system and the implications of the Court's decisions in criminal justice and immigration cases.

NACDL and its members have a longstanding interest in the question whether the rule of lenity applies when a court confronts an ambiguous statutory provision that has both civil and criminal applications and that an administrative agency has interpreted. NACDL filed an amicus brief in this Court on that subject last Term in *Luna Torres v. Lynch*, No. 14-1096. Given NACDL's expertise on this issue, NACDL respectfully submits that its perspective would be helpful to the Court in deciding this case.

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[1] Pursuant to Supreme Court Rule 37.3(a), Petitioner and Respondent have consented to the filing of this brief. Petitioner has filed a blanket consent to the filing of amicus curiae briefs. A letter of consent from Respondent has been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, amicus represents that no party authored this brief in whole or in part, and no person or entity, other than amicus curiae, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION

This case concerns the meaning of the statutory term "sexual abuse of a minor," an "aggravated felony" under the Immigration and Nationality Act (INA). 8 U.S.C. § 1101(a)(43)(A) (defining "aggravated felony" to include "murder, rape, or sexual abuse of a minor"). The Sixth Circuit held that petitioner's conviction under California Penal Code section 261.5(c)—which criminalizes consensual sexual conduct that is not even criminal in 43 states and is punishable as a felony in just three—constituted an "aggravated felony." In so holding, the Sixth Circuit did not determine that the Board of Immigration Appeals' (BIA's) interpretation of section 1101(a)(43) was the *best* reading of the statute. Rather, it deferred to the BIA's reading as a *reasonable* interpretation under *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). This was error.

The Sixth Circuit misconceived the role of *Chevron* deference in a case, such as this one, calling for an interpretation of a "hybrid" statute—one carrying both civil and criminal applications. When a court confronts such a statute and identifies an ambiguity in it, rather than deferring to the agency's interpretation under *Chevron*, the court should apply all relevant principles of statutory interpretation, including (as relevant here) the rule of lenity. "All manner of presumptions, substantive canons and clear-statement rules take precedence over conflicting agency views." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 731 (6th Cir. 2013)

(Sutton, J., concurring) (citing numerous examples from this Court's rulings).

The reason for this is straightforward. It is a principle nearly as old as the common law itself that criminal statutes must be interpreted according to the rule of lenity, which requires ambiguities to be resolved in the defendant's favor and narrows a statute's potential punitive reach. *United States v. Bass*, 404 U.S. 336, 347 (1971). This Court has also recognized a unitary-meaning principle: a statutory provision that has both civil and criminal applications carries a single, unitary meaning. *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004).

Put together, these two principles compel the conclusion that the rule of lenity must be applied to hybrid statutes even when the question of the statute's reach arises in a civil case. The Court's opinions recognize as much. See, *e.g.*, *id.*; *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 518 n.10 (1992) (plurality opinion); *FCC v. ABC*, 347 U.S. 284, 296 (1954) (explaining that lenity must be applied even in a civil case because "[t]here cannot be one construction for the Federal Communications Commission and another for the Department of Justice"). Application of the rule of lenity leaves no room for *Chevron* deference: *Chevron* comes into play only *after* applying traditional tools of statutory interpretation, and the rule of lenity is one such tool.

Not only does doctrinal reasoning point toward this result; so too do the functional policy rationales underlying the rule of lenity. The rule of lenity serves "to promote fair notice to those subject to the criminal laws, to minimize the risk of selective or arbitrary enforcement, and to maintain the proper balance be-

tween Congress, prosecutors, and courts." *United States v. Kozminski*, 487 U.S. 931, 952 (1988). Given the proliferation of hybrid statutes, many with far-reaching criminal provisions, applying the rule of lenity rather than *Chevron* helps to protect the public from arbitrary or unfair criminal prosecutions based on obscure administrative interpretations of ambiguous statutes.

Against all this, the Court of Appeals in this case believed that a footnote in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 704 n.18 (1995), required deference to the BIA's interpretation of section 1101(a)(43), notwithstanding that provision's criminal applications. Pet. App. 10a. But *Babbitt*'s footnote cannot bear the weight the Sixth Circuit placed on it. Accepting the Sixth Circuit's reading of *Babbitt* means accepting (implausibly) that this Court overruled longstanding precedent without expressly saying so. Moreover, *Babbitt* is distinguishable in key respects: it involved a facial challenge to a 20-year-old regulation, not (as here) a challenge to an agency interpretation made through case-by-case adjudication years after the relevant conduct.

Even if the *Chevron* framework applies to agency interpretations of hybrid statutes, the BIA's interpretation here deserves no deference. As discussed in petitioner's brief, the BIA's reading of the statute is not a reasonable one. Two additional considerations make deference inappropriate in this case.

First, the BIA's lack of expertise in applying or interpreting criminal laws further counsels against *Chevron* deference here, since "practical agency expertise" is one of *Chevron*'s main rationales. *Pension*

Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633, 651-52 (1990). Courts, not government agencies, are best suited to apply the categorical approach to determine what crimes constitute "aggravated felonies."

Second, affording *Chevron* deference to the BIA's interpretation would create significant practical difficulties for criminal-defense lawyers and their clients. Under *Padilla v. Kentucky*, 559 U.S. 356 (2010), defense counsel must advise their clients of the immigration consequences of any plea agreement. Deference to the BIA's interpretations of the INA would charge criminal defense attorneys with awareness of ever-shifting immigration law, at the administrative level, in order to meet their constitutional obligations. Not only that, criminal defense attorneys would be obligated to try to *predict* whether the BIA might rely (as it did here, see Petr. Br. 28-29) on a wide variety non-criminal sources, such as periodicals and scientific journals, to determine the immigration consequences of criminal convictions. The practical impossibility of that task confirms that *Chevron* deference is unwarranted here.

ARGUMENT

NACDL agrees with petitioner that the Sixth Circuit misapplied the categorical approach in determining the meaning of the statutory term "sexual abuse of a minor," 8 U.S.C. § 1101(a)(43)(A). See Petr. Br. 14-35. It submits this brief not to rehash those arguments but to elaborate on an additional error committed by the Court of Appeals: affording *Chevron* deference to the BIA's interpretation of "sexual abuse of a minor"

without resort to the rule of lenity, notwithstanding the many criminal applications of section 1101(a)(43).

I. BIA INTERPRETATIONS OF "AGGRAVATED FELONY" DO NOT QUALIFY FOR *CHEVRON* DEFERENCE

Two established principles, taken together, compel the conclusion that the Sixth Circuit erred in affording *Chevron* deference to the BIA's statutory interpretation rather than applying the rule of lenity to resolve the statutory ambiguity. *First*, the rule of lenity has long directed courts to interpret ambiguity in a criminal statute narrowly, in favor of the defendant. *E.g.*, *Bass*, 404 U.S. at 347. *Second*, "hybrid" statutory provisions—those with both civil and criminal applications—have a single, unitary meaning that does not shift depending on context. *E.g.*, *Leocal*, 543 U.S. at 11 n.8.

In multiple cases, this Court has already recognized that these principles, when combined, require application of the rule of lenity to hybrid statutory provisions. *E.g.*, *Thompson/Center Arms Co.*, 504 U.S. at 518 n.10 (plurality opinion); *id.* at 519 (Scalia, J., concurring in the judgment) (agreeing that the rule of lenity applies); *FCC v. ABC*, 347 U.S. at 296. That approach is in full accord with the rationales underlying the rule of lenity. It would also protect, rather than undermine, the separation of powers.

In reaching a contrary result, the Sixth Circuit relied entirely on a single footnote in *Babbitt*, 515 U.S. at 704 n.18. But *Babbitt* cannot support the great weight the Court of Appeals put on it—it would require accepting that this Court overruled longstanding precedent and did so without expressly saying so. If the

Babbitt footnote is not simply overruled itself, it should at the least be given a narrower reading that would accommodate rather than contradict these precedents.

A. Section 1101(a)(43) Has Extensive Criminal Applications, with Substantial Penal Consequences

The INA, like numerous other statutes, has both civil and criminal applications. It criminalizes, among other things, (1) an immigrant's failure to leave the country after an order of removal, 8 U.S.C. § 1253; (2) the harboring of certain immigrants, *id.* § 1324; (3) an immigrant's improper entry, or reentry, into this country, *id.* §§ 1325, 1326; (4) providing assistance to immigrants who are improperly entering the country, *id.* § 1327; and (5) the importation of immigrants for immoral purposes, *id.* § 1328.

Section 1101(a)(43), the INA provision at issue in this case, itself has numerous and significant criminal applications. For example, it is a felony to aid or assist "any alien inadmissible under section 1182(a)(2) (insofar as an alien inadmissible under such section has been convicted of an aggravated felony)." 8 U.S.C. § 1327. Likewise, the federal failure-to-depart statute makes it a felony for immigrants convicted of an aggravated felony to remain in the country. See *id.* §§ 1253(a)(1), 1227(a)(2)(A)(iii).

Section 1101(a)(43) also substantially increases the sentencing exposure of those convicted of certain federal criminal offenses. For example, the maximum penalty authorized by statute for illegal reentry under 8 U.S.C. § 1326 is 2 years for a "simple" offense, meaning no enhancements based on predicate convictions, but 20 years if the defendant has been previously con-

victed of an aggravated felony. See *id.* § 1326(b)(2) (also identifying an intermediate penalty for those with prior non-aggravated-felony convictions). Similarly, a federal criminal defendant faces a maximum prison term of 4 years for "simple" failure to depart under 8 U.S.C. § 1253(a)(1), but he or she faces a maximum 10-year prison term if previously convicted of an aggravated felony. See *id.*; *id.* § 1227(a)(2)(A)(iii).

These criminal law consequences under section 1101(a)(43) are widespread. The illegal reentry statute is the second-most prosecuted felony (after illegal entry) in the federal courts. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, TRAC REPORTS, PROSECUTIONS FOR 2014 (Dec. 5, 2014).[2] In 2013, illegal reentry cases accounted for more than a quarter of all federal criminal sentencings and five out of every six sentencings involving immigration offenses. U.S. SENTENCING COMMISSION, ILLEGAL REENTRY OFFENSES 9-10 (April 2015).[3] Moreover, of the 18,498 illegal reentry defendants sentenced in 2013, "slightly more than 40 percent faced a statutory maximum of 20 years under § 1326(b)(2)" because of an aggravated felony conviction, instead of a two- or ten-year statutory maximum that otherwise would apply. *Id.*

Not surprisingly, then, federal courts routinely are called upon in criminal cases to determine what crimes rank as "aggravated felon[ies]" within the meaning of section 1101(a)(43), including under the "sexual abuse of a minor" provision at issue in this case. See, *e.g.*,

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[2] http://tracfed.syr.edu/results/9x20548211252a.html.

[3] http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/immigration/2015_Illegal-Reentry-Report.pdf.

United States v. Londono-Quintero, 289 F.3d 147, 151 (1st Cir. 2002) (interpreting the aggravated felony of "sexual abuse of a minor," § 1101(a)(43)(A)); *United States v. Martinez*, 786 F.3d 1227, 1230-33 (9th Cir. 2015) (same); *United States v. Pacheco*, 225 F.3d 148, 153-55 (2d Cir. 2000) (interpreting the aggravated felony of "theft offense," § 1101(a)(43)(G)); *United States v. Gamboa-Garcia*, 620 F.3d 546, 548-50 (5th Cir. 2010) (interpreting the aggravated felony of "an offense relating to obstruction of justice," § 1101(a)(43)(S)).

B. Because Section 1101(a)(43) Has Criminal Law Consequences, the Rule of Lenity Rather than *Chevron* Must Be Applied to Resolve Statutory Ambiguities

1. This Court's Precedent Dictates that the Rule of Lenity Applies, Requiring "Aggravated Felony" to Be Construed Narrowly and in Favor of Petitioner

It is a fundamental rule of statutory interpretation, "perhaps not much less old than construction itself," *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.), that in construing a criminal statute, the rule of lenity requires that ambiguities be resolved in the defendant's favor. *Bass*, 404 U.S. at 347; see also, *e.g.*, *Crandon v. United States*, 494 U.S. 152, 158 (1990) (describing lenity as a "time-honored interpretive guideline"); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *88 (describing lenity as a rule of strict construction); Zachary

Price, *The Rule of Lenity as a Rule of Structure*, 72 Fordham L. Rev. 885, 897 (2004) (discussing the rule of lenity's "origins in the efforts of common law courts in the seventeenth and eighteenth centuries"). The rule has its roots in several foundational principles of American law: "to promote fair notice to those subject to the criminal laws, to minimize the risk of selective and arbitrary enforcement, and to maintain the proper balance between Congress, prosecutors, and courts." *Kozminski*, 487 U.S. at 952.

It is also well established that, where a single statute has both civil and criminal applications, courts "must interpret the statute consistently, whether [they] encounter its application in a criminal or non-criminal context." *Leocal*, 543 U.S. at 11 n.8; see also, *e.g.*, *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 16 (2011); *Clark v. Martinez*, 543 U.S. 371, 380 (2005); *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 408-09 (2003); *FCC v. ABC*, 347 U.S. at 296 ("There cannot be one construction for the Federal Communications Commission and another for the Department of Justice."). Disregarding this unitary-meaning principle "would render every statute a chameleon, its meaning subject to change" depending on the circumstances. *Clark*, 543 U.S. at 382.

Putting these two rules together leads to the conclusion that the rule of lenity must be applied to "hybrid" statutes with both civil and criminal applications. This Court's opinions say as much. See *Leocal*, 543 U.S. at 11 n.8; *Kasten*, 563 U.S. at 16; *FCC v. ABC*, 347 U.S. at 296; *Thompson/Center Arms Co.*, 504 U.S. at 518 n.10 (plurality opinion) (rule of lenity applied to interpretation of civil tax provision with criminal applications); *id.* at 519 (Scalia, J., concurring in the judgment)

(agreeing that the rule of lenity applies); cf. *Clark*, 543 U.S. at 380 ("It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern."). Indeed, in *Leocal*, the government itself acknowledged that deference to agency interpretation of a criminal statute is unwarranted even where that statute also has civil applications. See Brief for Respondent, *Leocal v. Ashcroft*, No. 03-583, 2004 WL 1617398, at *32-33 (U.S. July 14, 2004).

Application of the rule of lenity leaves no place for *Chevron* deference. Even if the *Chevron* framework were theoretically applicable to hybrid statutes, courts must apply the "traditional tools of statutory construction" *before* deeming a statute ambiguous and deferring to an agency's interpretation. *Chevron*, 467 U.S. at 843 n.9. This includes the rule of lenity. See *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 985 (2005) (noting that lower court had "invoked no other rule of construction (*such as the rule of lenity*) requiring it to conclude that the statute was unambiguous" (emphasis added)); *Carter*, 736 F.3d at 732 (Sutton, J., concurring) (noting that "*Chevron* accommodates rather than trumps the lenity principle"); William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law As Equilibrium*, 108 Harv. L. Rev. 26, 68-69, 104 (1994) (explaining that lenity is a "substantive canon" of statutory construction).

At the very least, the rule of lenity must take precedence over *Chevron* in cases involving "grievous" ambiguities—the standard this Court has set for application

of the rule. *E.g.*, *Maracich v. Spears*, 133 S. Ct. 2191, 2209 (2013). This is such a case: as Judge Sutton recognized, it is a "classic occasion for applying the rule of lenity." Pet. App. 21a. The key statutory phrase at issue in this case—"sexual abuse of a minor"—contains just five words and provides virtually no contextual guidance to courts, agencies, or lawyers. And the ordinary approach one would use to determine whether "sexual abuse of a minor" categorically encompasses the conduct criminalized by Penal Code section 261.5(c)—looking to the laws of the 50 States, the federal government, and the Model Penal Code—strongly suggests the answer is no. See Petr. Br. 15-21. At a minimum, under the rule of lenity, the statutory text is not sufficiently clear to permit a holding that Penal Code section 261.5(c) categorically defines an aggravated felony.

2. Applying the Rule of Lenity Rather than *Chevron* to Statutes with Both Civil and Criminal Applications Fulfills the Rule's Purposes and Protects Core Constitutional Values

Applying the rule of lenity in cases like this one dovetails with the rule's central purpose of requiring the government to provide "fair warning" of what the criminal laws prohibit. *Bass*, 404 U.S. at 348; *McBoyle v. United States*, 283 U.S. 25, 27 (1931). Deferring to an agency's interpretation of a hybrid statute threatens to deprive the public of fair notice. The citizen must guess, among other things, whether a statute will be deemed ambiguous (courts often disagree) and

whether an agency's interpretation will be deemed reasonable (courts often disagree about this, too).

Exacerbating this problem, agencies routinely change their interpretation of statutory provisions. Deference thus would "allow one administration to criminalize conduct within the scope of the ambiguity, the next administration to decriminalize it, and the third to recriminalize it." *Carter*, 736 F.3d at 729 (Sutton, J., concurring). If the meaning of hybrid statutes could shift with the political winds, individuals could find themselves facing criminal prosecution (or enhanced punishment) based on new agency pronouncements for actions that were perfectly legal (or were punished less harshly) just weeks or months earlier. As applied in criminal cases, that would violate the Ex Post Facto Clause. See *Peugh v. United States*, 133 S. Ct. 2072, 2081 (2013). And the problem of "lack of fair notice," which is one of the "central concerns of the *Ex Post Facto* Clause," *Lynce v. Mathis*, 519 U.S. 433, 441 (1997), is a serious one in the immigration context as well, given instabilities in the BIA's interpretations of many statutory provisions. See, *e.g.*, *Judulang v. Holder*, 132 S. Ct. 476, 488 (2011) (unanimously rejecting the BIA's interpretation while noting that the "BIA repeatedly vacillated" in determining whether § 212(c) of the INA permits the Attorney General to grant discretionary relief to a deportable non-citizen).

This fair-notice problem, moreover, must also be viewed in the context of the increasing number and reach of criminal laws since the middle of the twentieth century. See Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 783-84 (1997). There are so many federal crimes now that it is diffi-

cult to count them, but there are at least several thousand. See, *e.g.*, JOHN S. BAKER, JR. ET AL., THE FEDERALIST SOC'Y FOR LAW & PUB. POLICY STUDIES, MEASURING THE EXPLOSIVE GROWTH OF FEDERAL CRIME LEGISLATION 3 (2004) (estimating that the U.S. Code contains over 4,000 criminal statutes).

In this setting, the rule of lenity helps "minimize the risk of selective or arbitrary enforcement." *Kozminski*, 487 U.S. at 952; see also Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 Sup. Ct. Rev. 345, 406 (noting that the rule of lenity "reduce[s] the opportunities for prosecutorial abuse"). By contrast, layering *Chevron* deference atop the increasingly broad array of federal criminal laws would give the government substantial power to engage in selective prosecution based on obscure administrative pronouncements. "[W]hen the criminal code comes to cover so many facets of daily life, ... prosecutors can almost choose their targets with impunity," Neil M. Gorsuch, *Law's Irony*, 37 Harv. J.L. & Pub. Pol'y 743, 748 (2014), a problem compounded when *Chevron* deference is afforded to the government's interpretations of expansive hybrid laws. Individuals disfavored by the government for one reason or another could well become the target of prosecutions based on ambiguous statutes. See WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 2-5 (2011).

Applying the rule of lenity rather than *Chevron* deference also accords with another main purpose of the rule: protection of the separation of powers. This Court has recognized that "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of

the community, legislatures and not courts should define criminal activity." *Bass*, 404 U.S. at 348.

That principle would ring hollow if courts deferred to agency interpretations of hybrid statutes. Doing so would give Executive Branch officials the power to "in effect create (and uncreate) new crimes at will, so long as they do not roam beyond ambiguities that the laws contain." *Whitman v. United States*, 135 S. Ct. 352, 353 (2014) (Scalia, J., statement respecting denial of certiorari); see also *Carter*, 736 F.3d at 731 (Sutton, J., concurring) (noting that deference would "giv[e] unelected commissioners and directors and administrators carte blanche to decide when an ambiguous statute justifies sending people to prison"). It would also "turn the normal construction of criminal statutes upside-down, replacing the doctrine of lenity with a doctrine of severity." *Crandon*, 494 U.S. at 178 (Scalia, J., concurring in the judgment).

Indeed, applying *Chevron* deference rather than the rule of lenity would contravene two related lines of this Court's precedent pertaining to the separation of powers. For over one hundred years, the Court has consistently explained that the Constitution allows Congress to delegate authority to the Executive to define crimes only when it speaks clearly. See, *e.g.*, *United States v. Grimaud*, 220 U.S. 506 (1911); *United States v. Eaton*, 144 U.S. 677, 688 (1892). While unclear delegation by Congress is no obstacle to agency rulemaking (or to *Chevron* deference) in the ordinary civil context, see *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874-75 (2013), the clear-statement rule "compels Congress to legislate deliberately and explicitly before departing from the Constitution's traditional distribution of authority" in the criminal law context. *Carter*,

736 F.3d at 733 (Sutton, J., concurring). Deferring to agency interpretations of ambiguous statutes with criminal applications would impermissibly allow agencies to make conduct criminal without a clear statement from Congress giving the agency that authority.

Similarly, while delegation to agencies requires only an "'intelligible principle'" in the ordinary civil context, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001), this Court has suggested that the Constitution may require "something more than an 'intelligible principle'" when it comes to a delegation of authority to criminalize conduct—something that "meaningfully constrains" the Executive may be needed. *Touby v. United States*, 500 U.S. 160, 165-66 (1991); *Yakus v. United States*, 321 U.S. 414, 423-27 (1944). But under the Sixth Circuit's approach here, "an agency could fill a gap in a criminal statute even where Congress provides no specific guidance about how to fill it." See *Carter*, 736 F.3d at 734 (Sutton, J., concurring).

C. *Babbitt*'s Footnote Does Not Command a Contrary Result

Contrary to what the Court of Appeals believed (see Pet. App. 9a), this Court's opinion in *Babbitt* provides no basis to depart from the well-established principles discussed above. In *Babbitt*, the Court rejected the "argu[ment] that the rule of lenity should foreclose any deference to the Secretary [of the Interior]'s interpretation" of the statutory term "take" in the Endangered Species Act. 515 U.S. at 704 n.18. The Court stated that it had "never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement."

Id. For several reasons, this "drive-by" footnote "deserves little weight," *Whitman*, 135 S. Ct. at 354 (Scalia, J., statement respecting the denial of certiorari), and should not guide this Court's analysis.

Most importantly, reading the *Babbitt* footnote broadly "contradicts the many cases before and since holding that, if a law has both criminal and civil applications, the rule of lenity governs its interpretation in both settings." *Id.* at 353-54 (citing *Leocal*, 543 U.S. at 11-12 n.8 and *Thompson/Center Arms Co.*, 505 U.S. at 518 n.10 (plurality opinion)). And this "Court does not normally overturn, or ... dramatically limit, earlier authority *sub silentio*." *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000). To the extent the *Babbitt* footnote may be considered to have done so, it can and should be overruled. See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 37-38 (1991) (Scalia, J., concurring in the judgment) (in such a situation, there is "no valid *stare decisis* claim").

Indeed, this Court itself has evinced uncertainty about whether—even in the context of environmental regulation—the *Babbitt* footnote should be taken at face value. Six years after *Babbitt*, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), the petitioner argued that "[b]ecause violations of the [Clean Water Act] carry criminal penalties, ... the rule of lenity" provided "another basis for rejecting the [government's] interpretation of the [Act]." *Id.* at 174 n.8. The Court opted to "not address this alternative argument" in light of its ruling in the petitioner's favor on other grounds. *Id.* If *Babbitt* had resolved the issue, the Court could simply have said as much, rather than declining to address it.

Alternatively, the *Babbitt* footnote should be limited in any of several ways that would help restore the proper relationship between *Chevron* and the rule of lenity in this case and others like it.

First, the *Babbitt* footnote emphasized that the regulation at issue in that case had "existed for two decades," giving a "fair warning of its consequences." 515 U.S. at 704 n.18. *Babbitt* also distinguished *Thompson/Center Arms Co.* on the ground that "no regulation was present" in that case. *Id.* Here, as in *Thompson/Center Arms Co.* and unlike in *Babbitt*, there is no regulation and no fair warning. The agency interpretation here arises from "case-by-case adjudication," Pet. App. 15a, and was not issued until 2015, postdating petitioner's crime by nearly six years, *id.* at 27a-28a. Given that the conduct at issue is entirely legal in 43 states, is a felony in just three, and is deemed "sexual abuse" in just one (Oregon, where it is punishable only as a misdemeanor), see Petr. Br. 20-21; Pet. 25-27 & n.7; Or. Rev. Stat. § 163.415, it was hardly foreseeable that the BIA would later by adjudication deem the crime to be "sexual abuse of a minor" constituting an "aggravated felony."

Second, the *Babbitt* footnote emphasized that that case involved a "facial challenge[]" to the agency's regulation, not any "specific factual dispute" in a particular case. 515 U.S. at 704 n.18. As Judge Sutton has noted, that is not the sort of setting in which one would expect the rule of lenity to come into play to begin with. Facial challenges are "the sorts of claims that raise arguments—say that the regulation exceeded the agency's authority and thus was unenforceable in all its applications—that have no connection to the rule of lenity." Pet. App. 23a-24a; see also *Carter*, 736

F.3d at 735 (Sutton, J., concurring) (similar). This case does not involve a facial challenge.

Third, in *Babbitt*, Congress *had* expressly made it a crime to violate any "regulation issued in order to implement" the various statutory provisions at issue. See 16 U.S.C. § 1540(b)(1). As a result, two of the main concerns stemming from deference to agency interpretation of hybrid statutes—the clear-statement rule and the nondelegation doctrine, see *supra* pp. 15-16—were not implicated, and the separation-of-powers concern carried far less weight. Here, by contrast, no statute contemplates that the BIA's pronouncements will carry criminal consequences. See Petr. Br. 43-44.

II. EVEN IF THE *CHEVRON* FRAMEWORK APPLIES, DEFERENCE TO THE BIA'S INTERPRETATION IS NOT WARRANTED HERE

Even if the *Chevron* framework may apply to agency interpretations of some hybrid statutes, deference is not appropriate in this case. This is so, above all, because the BIA's interpretation is not a reasonable one and reflects a fundamental misapplication of the categorical approach. See Petr. Br. 14-34, 44-47. Amicus highlights two additional reasons why, even under the *Chevron* framework, no deference is warranted here.

A. The BIA Does Not Administer Criminal Laws and Lacks Relevant Criminal Law Expertise

Chevron deference rests, in significant part, on respect for "practical agency expertise" in the subject matter of the statute the agency it administers. *Pension Benefit Guaranty Corp.*, 496 U.S. at 651-52; see

also *Chevron*, 467 U.S. at 863-65. Considerations of agency expertise in this case, however, confirm that no deference is warranted.

Under *Chevron*, courts may afford deference to an agency's interpretation of a "statute which it administers." 467 U.S. at 842. But agencies do not "administer" criminal laws. Courts alone are charged with that responsibility. *Abramski v. United States*, 134 S. Ct. 2259, 2274 (2014) ("[C]riminal laws are for courts, not for the Government, to construe."). Indeed, this Court has "*never* held that the Government's reading of a criminal statute is entitled to any deference." *United States v. Apel*, 134 S. Ct. 1144, 1151 (2014) (emphasis added). The same is true of hybrid statutes with civil and criminal applications. See, *e.g.*, *Crandon*, 494 U.S. at 177 (Scalia, J., concurring in the judgment) ("The law in question, a criminal statute, is not administered by any agency but by the courts."). To be sure, the BIA administers the civil provisions of the INA, but it does not (and cannot) administer those laws in their criminal settings. See, *e.g.*, *id.* (explaining that administrative necessity is "not the sort of specific responsibility for administering the law that triggers *Chevron*").

Chevron itself shows why courts should not defer to the BIA's interpretation here. This Court explained in *Chevron* that, in administering the Clean Air Act, the Environmental Protection Agency is charged with "implementing policy decisions in a technical and complex arena." 467 U.S. at 863. The Court observed that "[p]erhaps" Congress left to the agency the ability to "strike the balance" between competing interests in this area because "those with great expertise and charged with responsibility for administering [the law]

would be in a better position to do so." *Id.* at 865. By contrast, "[j]udges" were "not experts in the field." *Id.*

The situation here is far different. As several courts of appeals have recognized, "[t]he BIA has no special expertise by virtue of its statutory responsibilities in construing state or federal criminal statutes." *Marmolejo-Campos v. Holder*, 558 F.3d 903, 907 (9th Cir. 2009); see also, *e.g.*, *Efstathiadis v. Holder*, 752 F.3d 591, 594 (2d Cir. 2014); *Francis v. Reno*, 269 F.3d 162, 168 (3d Cir. 2001). That is especially true here. The phrase "sexual abuse of a minor" is not an immigration term of art. Rather, as this Court has recognized, it is a "generic crime[]" that calls for application of the categorical approach. *Nijhawan v. Holder*, 557 U.S. 29, 37 (2009).

The categorical approach is difficult enough for courts to apply. See, *e.g.*, *Descamps v. United States*, 133 S. Ct. 2276, 2287 (2013) (noting that lower court's "new way" of applying the categorical approach "has no roots in our precedents"). But it is at least the sort of legal-reasoning task in which courts have expertise. By contrast, there is no reason to believe executive agencies have any such expertise, and every reason to doubt whether they do, as this case illustrates.

The BIA's application of the categorical approach here would have earned it an "F" in law school. The BIA relied on non-legal sources and its own policy beliefs rather than consulting state and federal criminal laws and the Model Penal Code. See Petr. Br. 9-10. The BIA also considered it "noteworthy" that "[i]f we were to conclude that the offense at issue here is not categorically 'sexual abuse of a minor,' sexual offenders who were prosecuted under this statute for victimizing

children under the age of 16 would not be removable for having committed a 'sexual abuse of a minor' aggravated felony under the Act." Pet. App. 39a n.7. That flawed reasoning turns the categorical approach on its head. Rather than considering "'the least of the acts' criminalized" under Penal Code section 261.5(c)," *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013), and comparing that conduct to the generic offense, the BIA identified the *most* culpable conduct and justified its categorical treatment of section 261.5(c) on that basis.

Such errors show why the BIA has not offered a permissible construction of the statute—and why its constructions of section 1101(a)(43) are not proper candidates for *Chevron* deference in the first place.

B. Affording *Chevron* Deference to the BIA's Interpretation Would Create Significant Practical Difficulties for Criminal Defense Lawyers and Their Clients

One final reason for not deferring to the BIA's interpretation of section 1101(a)(43) is to ensure that the provision is interpreted consistently over time, especially in its criminal applications. Because of the unique constitutional obligations placed on criminal defense counsel, affording *Chevron* deference to the BIA's interpretation of criminal laws will place an immense burden on attorneys, to the detriment of their clients.

Under *Padilla*, 559 U.S. at 367, defense attorneys are required to advise their clients of the immigration consequences of plea agreements. The categorical approach facilitates the performance of this duty: it

"works to promote efficiency, fairness, and predictability in the administration of immigration law" by enabling noncitizens and their attorneys "to anticipate the immigration consequences of guilty pleas in criminal court, and to enter safe harbor guilty pleas that do not expose the alien defendant to the risk of immigration sanctions." *Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015) (alterations and internal quotation marks omitted).

Affording *Chevron* deference to the BIA's interpretation would eliminate those benefits and would increase exponentially the difficulties criminal defense attorneys would face in advising their clients of the immigration consequences of criminal convictions. Immigration law is "quite complex" to begin with, and that is particularly true with respect to "the determination of whether a crime is an 'aggravated felony.'" *Padilla*, 559 U.S. at 377-78 (Alito, J., concurring in the judgment); see also *id.* at 378 ("'[N]othing is ever simple with immigration law'" (quoting R. MCWHIRTER, ABA, THE CRIMINAL LAWYER'S GUIDE TO IMMIGRATION LAW: QUESTIONS AND ANSWERS 130 (2d ed. 2006))). The difficulties criminal defense attorneys face would be magnified tenfold if the BIA's criminal law pronouncements received *Chevron* deference. Defense attorneys would be required to be aware of ever-shifting immigration law at the administrative level in order to provide effective assistance of counsel to their clients.

Indeed, the task is still more onerous: attorneys would have an obligation to try to *predict* the BIA's *future* rulings that might receive *Chevron* deference. In petitioner's case, for instance, his California conviction came nearly six years before the BIA's ruling. See

Pet. App. 27a-28a. Given the BIA's approach here—in which it relied upon an article in the *Journal of Family Planning Perspectives* in determining that petitioner's conviction constituted "sexual abuse of a minor," Pet. App. 35a-36a—attorneys could well be forced to consult far-flung, non-legal sources in trying to predict the BIA's future treatment of crimes. And that difficulty is only exacerbated by the BIA's frequent efforts to apply its administrative rulings retroactively in other cases. See generally *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1144-45 (10th Cir. 2016).

CONCLUSION

The judgment of the Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

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